No. 2595

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARCHIE A. CLONINGER,

Plaintiff in Error,

vs.

A. H. FINLAISON,

Defendant in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR.

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Filed this.....day of December, 1915.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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Statement of the Case.

This is an action to determine the ownership of a placer mining claim in the Chisana, commonly known as the Sushanna, district of Alaska. Plaintiff in error was plaintiff and defendant in error was defendant in the district court of Alaska.

Plaintiff made his location of the disputed ground on August 2, 1913. It is admitted that he sufficiently marked his claim upon the ground on that day (T. of R. p. 25). Within the time then required by territorial statute he did $100 worth of location work on the claim. This also is admitted (T. of R. p. 27). He also filed a certificate of location and location work required by the territorial law of

1913. The court first admitted this certificate in evidence and afterward ruled it out on the ground that it did not meet the requirements of law.

Defendant's claim to the ground was based on a location made for him by A. M. Taylor as attorney in fact on July 3, 1913. Plaintiff admitted that he found a location notice—Finlaison by Taylor, attorney in fact, on August 1. Also corner stakes unmarked. He testified that he examined the official records that night and they contained no power of attorney from Finlaison to Taylor. He located the ground next day. Defendant pleaded that his power of attorney was filed July 12, 1913, with a mining district recorder elected by the miners, and on July 25, 1913, with the precinct recorder. As the court granted a nonsuit no evidence for defendant was taken.

The pleadings raise the issue of the sufficiency of a location by power of attorney before the instrument is recorded in some precinct of the judicial division wherein the claim is situated, under the act of Congress of August 1, 1912, but that issue was not reached in the trial except by plaintiff's admission that he found defendant's notice of location on the ground. At the close of plaintiff's case, on motion of defendant's counsel, the court granted a nonsuit on the ground that plaintiff admitted defendant's location by admitting that he saw the notice of location by attorney on the ground. The court, in granting the nonsuit, laid down the rule

that the law of 1912 did not require the power of attorney to be of record before location was made under it (T. of R. pp. 40-41). Judgment was entered for the defendant and plaintiff sued out this writ of error.

Assignments of Error.

Plaintiff assigns the following errors upon which he will rely in prosecuting this writ:

First.

The court erred in denying plaintiff's motion to strike from defendant's answer, on the ground that the same was irrelevant and did not constitute a defense to plaintiff's amended complaint, the following portions of said answer, to wit:

All of paragraph two, and all of paragraph three following the words "The White River Precinct and Recording District of Alaska," contained in the tenth and eleventh lines of said paragraph three.

Second.

The court erred in excluding from the evidence in the case, over the objection of plaintiff, the certificate of plaintiff's location of the ground in controversy and of his performance of the location work thereon required by law, filed by plaintiff in the recorder's office of White River precinct, and offered by him in evidence, to which ruling of the

court plaintiff then and there excepted and the exception was by the court duly allowed.

THIRD.

The court erred in excluding and striking out from the evidence in the case, over the objection of plaintiff, the certificate of plaintiff's location of the ground in controversy and of his performance of the location work thereon required by law, filed by plaintiff in the recorder's office of White River precinct, after defendant had made a motion for a nonsuit and a directed verdict in favor of defendant and against the plaintiff, at the conclusion of plaintiff's testimony, said certificate having been previously admitted by the court as evidence in the case, to which ruling of the court plaintiff then and there excepted and the exception was by the court duly allowed.

FOURTH.

The court erred in granting defendant's motion for a nonsuit at the close of plaintiff's testimony.

FIFTH.

The court erred in entering judgment in this cause in favor of defendant and against the plaintiff.

Argument.

The first and fourth assignments of error raise the issue involved in the construction to be placed upon the act of Congress of August 1, 1912, limiting

and regulating locations of placer claims in Alaska by power of attorney. The first assignment alleges error by the court in refusing to strike from defendant's answer to plaintiff's amended complaint a part of the affirmative defense. The congressional act in question contains the following requirement governing locations by power of attorney:

> "That no person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this act."

In the affirmative defense of his answer defendant made the following allegations, with the undoubted purpose of evading forfeiture of his claim because of failure of his agent to comply with the requirements of law just quoted. Plaintiff moved to strike these allegations on the ground that they did not constitute a defense:

"II.

> "That this court, by its order herein entered on May 7th, 1913, created the White River

Precinct and Recording District of Alaska, including therein the region wherein such location was made and where the ground in controversy in this action is situated; that a Recorder was appointed for said District, but the exact location of the recording office therein was not designated; that the district so created included practically all of that portion of the Third Judicial Division of Alaska which lies north and east of the summit of the Alaska Range of mountains; that there are no towns whatever situated within said District; and no roads or established trails whatever into or across the same; that the region was wholly inaccessible during the summer months after May 7th, 1913, except by means of poling boats on the larger rivers, and thence across a mountainous and uninhabited country, where no regular lines of travel or communication were established; that said District is so situated that communication with its various parts is impossible except at irregular intervals of weeks and months; that the recorder appointed for said District did not arrive therein and no recording office was established therein until on or about July 25th, 1913."

III.

Paragraph III avers that Andrew M. Taylor came into the White River district—date not mentioned—with a power of attorney from defendant authorizing said Taylor to locate placer claims in Alaska for defendant. The motion to strike included the further allegation that said Taylor came into the White River district carrying said power of attorney

> "with the intention in good faith of promptly recording the same there upon his arrival, but was prevented from doing so by the delay in the arrival of the recorder, and the consequent delay in establishing a recording office in said district; that it was impossible to record said Power of Attorney in any other recording office in the Third Judicial Division of Alaska without making a trip involving great expense and the loss of at least two months' times during the most valuable season for prospecting, and the said Taylor was dissuaded from attempting to record such power of attorney elsewhere by reason of the fact that such recording district had been duly created, and a recorder duly appointed, and the said Taylor had reason to believe that such recording office would be promptly established at some convenient place within said District".

Counsel for plaintiff urge that the portions of said answer just quoted are wholly irrelevant to any valid issue in the case for the reason that they merely offer excuses for not complying with the requirements of law. In a vast territorial expanse like Alaska, with a sparse population, travel is generally difficult and slow, and recording offices are often remote from regions which prospectors desire to explore. Prospecting has often been done in Alaska two or three hundred miles from the recording office of the precinct, but nobody ever contended outside of this case, so far as the writers of this brief know, that remoteness of a recorder's office excused failure to file instruments required by law to be recorded in order to affect other persons. Instances are numerous of miners who were

unable to file liens to secure their wages because they could not reach the recording office within thirty days, but no court in Alaska has ever assumed legislative authority to extend the statutory time. If Taylor was unable to record his power of attorney in the third division of Alaska before it became desirable to locate a claim for defendant that was one of the handicaps he incurred by entering the pathless wilderness he so plaintively describes, to locate placer claims for gentlemen who remained snugly at home, or at least it was a handicap to the principal. Mr. Taylor was able to locate two claims for himself each month after his arrival. His burden of sorrow was that he could not annex as much more land by the elastic reach of a power of attorney without skipping a statutory cog and he asks the courts to overlook the skip.

Plaintiff contends here, as in the trial court, that the plain meaning of the law of 1912 quoted above requires a power of attorney to be recorded before a location is made based upon it. True, the statute does not say "before" but it does say a location cannot be made *unless* such power of attorney is recorded, and proceeds to say, after stating the requirement of recording, that *any person so authorized* may locate for another. Multiplication of words could scarcely indicate more forcefully the intent of the law.

In any case the parts of the answer objected to should have been stricken, because if the law does not require recording of the power of attorney to

precede location it could not concern the court why it was not done.

The motion to strike was not waived by proceeding with the case after it was denied, since the motion was based upon the ground that the averments objected to did not state facts valid to a pleading, and objection on that ground is never waived.

More serious still, in the opinion of plaintiff's counsel, was the court's error in granting defendant's motion for a nonsuit. This is best shown by repeating the language of the court in so ruling:

> "In this case the plaintiff admits he went on this ground and found a notice of location and found the stakes on the ground and as I have held in all these cases where the question has arisen, it was not the purpose of the Wickersham act to require the recording of the power of attorney prior to the initial step or the first step in making the location. I do not believe in this case it is incumbent upon the defendant to go any further and I believe the motion ought to be granted and the motion will be granted."

At the time this ruling was made there was no evidence before the court showing or tending to show that defendant's power of attorney to Taylor had ever been recorded. The only testimony on that issue was the statement of plaintiff that he and the deputy recorder examined the record book on the evening of August 1, 1913, and the alleged power of attorney did not appear in it. So far as the record shows, outside the allegations of de-

fendant's answer, the power of attorney was not of record when the court granted the nonsuit at the trial in April, 1914. If the trial court's view of the law of 1912 is the correct construction the time for so deciding could not arise in this case until defendant proved that the power of attorney to Taylor was of record before plaintiff attempted to locate the ground. Plaintiff's admission that he saw the notice of location, Finlaison by Taylor, attorney in fact, was not an admission that the power of attorney was recorded.

PLAINTIFF'S CERTIFICATE OF LOCATION AND WORK.

The second and third assignments allege error by the court in excluding from evidence plaintiff's certificate of location and location work, required by the territorial law of 1913, which went into effect four days before plaintiff's location. The court admitted it and afterward struck it out. The record shows the following:

> By the COURT. "This notice is open to some criticism. * * * I think it substantially complies with the essential requirements of the statute and the objection will be overruled" (T. of R. p. 27).

Defendant's motion for a nonsuit asked also for a directed verdict for defendant. After stating that the motion for a nonsuit was granted the court added: "The jury will be instructed to bring in a verdict in favor of the defendant." Further proceedings are thus reported:

Mr. RITCHIE. "We save an exception to the order of the court granting the motion for a non-suit and we also except to the order directing the jury to bring in a verdict, for the reason that if the nonsuit is granted there is no room left for a directed verdict. The motion for a nonsuit, I take it, disposes of the case and no verdict is necessary."

By the COURT. "I am not clear upon this matter. We don't want to make any mistake about this part of it. You had better take the time to look into it and see that the proper course is followed."

* * * * * * * *

By the COURT. "I am satisfied on the record made that there is no use proceeding any further; that the plaintiff has not sustained the cause of action. The ground was not open, unappropriated ground at the time on the statements and admissions of the plaintiff himself, but I will take until two o'clock to inquire into the matter and I should like to have counsel do so also."

Afternoon Session.

By the COURT. "In this case of Cloninger versus Finlaison I have found since the adjournment this morning that it is necessary to modify the ruling I have made. * * * Now I believe that this Exhibit B, which is the declaratory statement or verified notice of location, does not conform to the requirements of the statute. * * * I feel that it is right to rule in this case that this notice of placer location, Plaintiff's Exhibit B, which was objected to at the time by the attorney for the defendant, be excluded and the objection will be sustained. That will be the order."

Mr. DONOHOE. "We desire an exception to the ruling of the court." (Exception allowed.) (T. of R. p. 42).

Exhibit B, which is a copy of the certificate in question, is found on page ..... of the record in this case. The territorial statute requiring it to be made stipulated for the following:

> "Sec. 10. Within ninety days after discovery the locator shall record with the recorder of the precinct wherein the claim is situate, a certificate of location. Such certificate shall contain:
>
> (a) The name or number of the claim;
>
> (b) The name of the locator or locators;
>
> (c) The date of discovery and posting of the location notice;
>
> (d) Number of feet in length and width claimed.
>
> Such certificate shall also set forth a description of the location of such claim with reference to some natural object, permanent monument or well known mining claim; a description of the boundaries, corner monuments and markings thereon, and a description of the location work and the place where the same has been performed. Such certificate of location shall not be accepted for record unless the same be verified, before the recorder of the precinct or some officer authorized to administer oaths, by the locator, or one of the locators, if there be more than one or by the authorized agent, having personal knowledge of the facts required to be stated therein."
>
> Sessions Laws of Alaska 1913, pp. 290-291.

It is needless to remind this court that prospectors' notices have always been construed with the extreme of liberality by all courts, for the obvious reason that prospectors are usually men of little education. Apparent good faith and an hon-

est effort to comply with the law is all that any court has ever required in a notice where discovery and necessary marking on the ground were shown. Both are admitted in this case, as already stated.

It seems hardly necessary to suggest to the court that the territorial law of 1913 made it necessary for a prospector to be also a fair lawyer and at least an amateur surveyor. So drastic were its requirements that the legislature of 1915 abrogated the certificate requirement just given.

If any authority is needed for the assertion that a prospector's notice is not held to strict compliance with statute it is found in Lindley on Mines, Vol. II, sec. 381, and cases there cited.

It is therefore respectfully submitted that the judgment of the court below should be reversed.

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